Mewah-Oils Sdn Bhd v Lushing Traders Pte Ltd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–721–05 OF 2015
DAVID WONG, MARY LIM AND HARMINDAR SINGH JJCA
14 FEBRUARY 2017

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Tort — Conversion — Right to sue for conversion — Respondent entered judgment against buyer in Singapore Court for unpaid price on sale of crude palm oil ('CPO') cargo — Respondent sued appellant in Malaysian Court for conversion of same cargo — Whether principles of merger or res judicata arising from Singapore judgment barred respondent from claiming against appellant — Whether law allowed separate claims against multiple tortfeasors for conversion of same goods — Whether claim against appellant founded on wrongful usurpation of respondent's title to and possessory rights in CPO by appropriating same and putting it to own use without respondent's knowledge and consent — Whether appellant's argument it acquired CPO in good faith without notice of respondent's rights/title not a defence

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The respondent bought 4,999,850 metric tons of crude palm oil ('CPO') from an Indonesian entity ('KPB') and then agreed to sell the same to another party ('Summerwind') and for it to be delivered to Bangladesh by ship ('Suppavan 1'). The CPO, however, ended up being delivered to, and discharged at, the appellant's shore tanks at Port Klang after which the appellant proceeded to process the CPO into refined palm olein. The appellant claimed it bought the CPO from its sister company, 'Mewaholeo', which had allegedly bought the same from Summerwind. The respondent sued the appellant in the High Court for the tort of conversion in receiving and dealing with the CPO in blatant disregard to the respondent's ownership and possessory rights to it. The respondent maintained that Summerwind never paid the purchase price for the CPO. It accordingly sued Summerwind and its two directors in the High Court in Singapore and entered judgment against them for the contracted sale price of the CPO. At the trial of the instant case, the appellant contended that: (a) the respondent failed to prove it had good title/immediate possessory rights to the CPO as it did not show it had actually paid KPB for the CPO; consequently, it had no locus standi to maintain the action for conversion; (b) the appellant had bought the CPO from Mewaholeo in good faith and without prior notice or knowledge of any purported rights of the respondent and therefore it had acquired good title to the CPO; and (c) the respondent's suit against Summerwind in the Singapore High Court for the price of the CPO and not for the CPO itself or the title to same estopped the respondent from now asserting that its title to the cargo was good. The trial court allowed the respondent's claim holding that on balance of probabilities it had proven its

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legal title and right to possession of the CPO at all material times and that the appellant had committed conversion by wrongfully appropriating the cargo for its own use. The court also held that the respondent's Singapore action was no bar to the instant suit as the law recognised separate claims against multiple tortfeasors in conversion in respect of the same goods. The instant appeal was against the High Court's decision.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) The trial judge rightly concluded that the respondent's possession and continued retention of the original bills of lading was the 'clearest possible proof of the plaintiff's retention of title to the CPO cargo that was discharged at Port Klang into the defendant's shore tanks'. Apart from the oral and documentary evidence adduced at trial, there was a strong presumption, which had not been displaced, that when the CPO was loaded onto the vessel Suppavan 1, the respondent had paid KPB for the said cargo. It was highly improbable that KPB would have released the CPO cargo to the respondent without being paid first. Considering all the circumstances, the trial judge was entitled to find that the respondent had, on balance of probabilities, proved it had the legal title and right to immediate possession of the CPO cargo on 8 November 2003. As such, the respondent could maintain its suit against the appellant for conversion (see paras 20–22).

(2) It was futile for the appellant to argue that it had acted under the misapprehension that the cargo belonged to Summerwind. Acting innocently, in good faith, in ignorance or by mistake, was generally irrelevant in a claim for conversion. A defendant's liability in conversion would be established whether or not he knew or had reason to know he was asserting rights that belonged to the plaintiff. In the instant case, the claim of acting innocently in receiving the cargo, although irrelevant, was not quite the case as the appellant appeared to have accepted a grossly defective bill of lading for the shipment. The possessory rights to the CPO had never passed to Summerwind as the original bills of lading had always remained with the respondent simply because it had not been paid for the goods. The appellant's acts of receiving the cargo from Suppavan 1 and then processing and refining the CPO into refined palm olein were without the knowledge and consent of the respondent as owner of the cargo. The trial court was therefore entitled to find that this constituted conversion of the respondent's goods (see paras 25, 27–28 & 38).

(3) The fact that there were two actions for conversion of the same goods against different entitles was not fatal as the law recognised separate claims against multiple tortfeasors in conversion. In the instant case, the tort of conversion was committed by Summerwind when it sought to deprive the respondent of the cargo without making payment. The

appellant was also liable as it had bought, received, processed and refined the cargo and failed to return it to the respondent. These were successive acts and liability attached independently for their separate roles. In the Singapore action, the respondent had expressly reserved and preserved its rights to the cargo and rights to possession, which possessory rights were a pre-requisite to a claim in conversion. The respondent had stated that at all material times they were the owners and holders of the bills of lading. There was no concession or admission that any title or possessory rights had been relinquished. In the circumstances, the principles of merger and res judicata did not apply and the Singapore judgment did not bar the respondent's claim against the appellant (see paras 35–38).

[Bahasa Malaysia summary

Responden telah membeli 4,999,850 tan metrik minyak kelapa sawit mentah ('MKSM') daripada entiti Indonesia ('KPB') dan kemudian bersetuju untuk menjual yang sama kepada pihak lain ('Summerwind') dan untuk ia dihantar ke Bangladesh melalui kapal ('Suppavan 1'). MKSM itu, bagaimanapun, tidak dihantar kepada dan dibebaskan, tangki-tangki pesisiran perayu di Port Klang selepas itu di mana perayu telah meneruskan untuk memproses MKSM itu menjadi minyak kelapa sawit yang ditapis. Perayu mendakwa ia telah membeli MKSM itu daripada syarikat subsidiarinya, 'Mewaholeo', yang dikatakan telah membeli yang sama daripada Summerwind. Responden telah menyaman perayu di Mahkamah Tinggi kerana tort penukaran dalam menerima dan mengendalikan MKSM itu tanpa menghiraukan milikan dan hak milikan responden terhadapnya. Responden mengekalkan bahawa Summerwind tidak membayar harga belian untuk MKSM itu. Sewajarnya ia telah menyaman Summerwind dan dua pengarahnya di Mahkamah Tinggi di Singapura dan telah memasukkan penghakiman terhadap mereka untuk harga jualan MKSM yang dikontrakkan. Semasa perbicaraan kes ini, perayu berhujah bahawa: (a) responden telah gagal membuktikan ia mempunyai hakmilik/hak milikan serta merta yang kukuh terhadap MKSM kerana ia tidak menunjukkan bahawa ia telah membayar KPB untuk MKSM itu; berikutan itu, ia tidak mempunyai locus standi untuk mengekalkan tindakan untuk penukaran; (b) perayu telah membeli MKSM itu daripada Mewaholeo dengan niat baik dan tanpa notis atau pengetahuan terdahulu tentang apa-apa hak milikan responden dan oleh itu telah memperoleh hakmilik yang kukuh ke atas MKSM itu; dan (c) guaman responden terhadap Sumemrwind di Mahkamah Tingi Summerwind untuk harga MKSM dan bukan untuk MKSM itu sendiri atau hakmilik yang sama mengestopan responden daripada sekarang menegaskan bahwa hakmiliknya terhadap kargo adalah kukuh. Mahkamah perbicaraan membenarkan tuntutan responden dengan memutuskan bahawa atas imbangan kebarangkalian ia telah membuktikan hakmilik sahnya dan hak milikan MKSM pada setiap masa matan dan bahawa perayu telah melakukan penukaran dengan secara salah menggunakan kargo itu untuk kegunaannya sendiri. Mahkamah juga memutuskan bahawa tindakan Singapura responden

bukan halangan kepada guaman ini kerana undang-undang mengiktiraf tuntutan berasingan terhadap pelbagai pelaku tort dalam penukaran berkenaan barangan yang sama. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Hakim perbicaraan telah membuat kesimpulan yang betul bahawa milikan dan berterusan responden berhubung penyimpanan bil muatan asal adalah 'clearest possible proof of the plaintiff's retention of title to the CPO cargo that was discharged at Port Klang into the defendant's shore tanks'. Selain daripada keterangan lisan dan dokumentari yang dikemukakan semasa perbicaraan, terdapat andaian kukuh, yang tidak pernah digantikan, bahawa apabila CPO dimuatkan ke dalam kapal Suppavan 1, responden perlu membayar KPB untuk kapal tersebut. Ia tidak mungkin untuk KPB mengeluarkan kargo CPO kepada responden tanpa membayar terlebih dahulu. Dengan mengambil kira kesemua keadaan, hakim perbicaraan berhak untuk mendapati bahawa responden telah, atas imbangan kebarangkalian, membuktikan ia mempunyai hakmilik dan hak untuk milikan serta-merta kargo CPO itu pada 8 November 2003. Oleh itu, responden boleh mengekalkan guamannya terhadap perayu untuk penukaran (lihat perenggan 20–22).

(2) Ia adalah sia-sia untuk perayu berhujah bahawa ia telah bertindak di bawah salah faham yang kargo itu dimiliki oleh Summerwind. Bertindak dengan jujur, dan berniat baik, tanpa mengetahui atau melalui kesilapan adalah pada amnya tidak relevan dalam tuntutan untuk penukaran. Liabiliti defendan dalam penukaran akan dibuktikan sama ada atau tidak dia mengetahui atau mempunyai sebab untuk mengetahui yang dia menegaskan hak yang dimiliki oleh plaintif. Dalam kes ini, tuntutan untuk bertindak dengan jujur dalam menerima kargo it, meskipun tidak relevan, bukan suatu kes sebegitu kerana perayu dilihat sebagai menerima bil muatan yang cacat dan melampau untuk penghantaran itu. Hak milikan terhadap CPO tidak pernah diserahkan kepada Summerwind kerana bil muatan asal sentiasa kekal dengan responden kerana ia tidak dibayar untuk barangan itu. Tindakan perayu menerima kargo daripada Suppavan 1 dan kemudian memproses dan menapis CPO menjadi minyak kelapa sawit yang ditapis adalah tanpa pengetahuan dan persetujuan responden sebagai pemilik kargo itu. Mahkamah perbicaraan dengan itu berhak untuk mendapati bahawa ini merupakan penukaran barangan responden (lihat perenggan 25, 27–28 & 38).

(3) Fakta bahawa terdapat dua tindakan untuk penukaran barangan yang sama terhadap hak-hak yang berbeza adalah tidak memudaratkan kerana undang-undang mengiktiraf tuntutan berasingan terhadap pelbagai

pelaku tort dalam penukaran. Dalam kes ini, tort penukaran telah dilakukan oleh Summerwind apabila ia memohon untuk menafikan responden kargo itu tanpa membuat bayaran. Perayu juga bertanggungjawab kerana ia telah membeli, menerima, memproses dan memperbaiki kargo itu dan gagal untuk memulangkannya kepada responden. Tindakan dan liabiliti berturut-turut tersebut berkait secara berasingan berhubungan peranan berasingan mereka. Dalam tindakan Singapura, responden dengan nyata telah merizab dan memelihara haknya ke atas kargo itu dan hak kepada milikan, yang mana hak milikan adalah prasyarat kepada tuntutan dalam penukaran. Responden telah menyatakan bahawa pada setiap masa matan mereka adalah pemilik dan pemegang bil muatan tersebut. Tiada konsesi atau pengakuan bahawa apa-apa gelaran atau hak tempat milik telah dilepaskan. Dalam keadaan berikut, prinsip penggabungan dan *res judicata* tidak terpakai dan penghakiman Singapura tidak melarang tuntutan responden terhadap perayu (lihat perenggan 35–38).]

Notes

For cases on right to sue for conversion, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 189.

Cases referred to

Air Conditioning Systems Design Sdn Bhd v Chuah Teong Hooi & Anor (as receiver and managers of the property of Atlas Intek (M) Sdn Bhd) [1998] 4 MLJ 633, HC (distd)

Enichem Anic SpA v Ampelos Shipping Co Ltd, The Delfini [1990] 1 Lloyd's Law Rep 252, CA (refd)

Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd; The Aliakmon [1986] 2 All ER 145, HL (refd)

Lushing Traders Pte Ltd v Mewah-Oils Sdn Bhd [2016] 6 AMR 616, HC (refd)

Marfani & Co Ltd v Midland Bank Ltd [1968] 1 WLR 956, CA (refd)

Mewah Oils Sdn Bhd v Felda-Johore Civil Suit No MT4-11–728 of 2009 (unreported), HC (refd)

Mitsui & Co Ltd and another v Flota Mercante Grancolombiana SA; The Ciudad de Pasto, The Ciudad de Neiva [1989] 1 All ER 951; [1988] 1 WLR 1145, CA (refd)

RH Willis and Son (a firm) v British Car Auctions Ltd [1978] 1 WLR 438, CA (refd)

Rimba Muda Timber Trading v Lim Kuoh Wee [2006] 4 MLJ 505, FC (refd)

Shanti Kant Jingham v Owners or other persons interested in the vessel 'Indera Pertama' [1989] 3 MLJ 58, HC (refd)

Syarikat Bekalan Air Selangor Sdn Bhd v Liew Lai Yin [2010] 3 MLJ 76, HC (refd)

United Plastics Sdn Bhd v Chan Teng Song & Anor [2009] MLJU 1556; [2010] 8 CLJ 120, HC (refd)

Legislation referred to

Sales of Goods Act 1957 s 2

Appeal from: Civil Suit No MT22–1553 of 2009 (High Court, Shah Alam)

Muhammad Shafee Abdullah (Sara Ann Chay Sue May with him) (Shafee & Co) for the appellant.
Philip Teoh (Azmi & Assoc) for the respondent.

Harmindar Singh JCA:

[1] This is an appeal against the decision of the High Court at Shah Alam given on 26 March 2015. The High Court had allowed the respondent's claims for the sum of USD1,917,965.75 together with interest for the tort of conversion. Aggrieved with this decision the appellant appealed to this court.

[2] This appeal was heard on 4 July 2016. After hearing the parties and taking into consideration the written submissions, we dismissed the appeal and affirmed the decision of the High Court. Our reasons for doing so now follow. For convenience the parties will be referred to as they were in the High Court.

THE RELEVANT FACTS

[3] The salient facts giving rise to the civil suit and as well summarised by the learned trial judge can be stated as follows. The plaintiff purchased 4.999,850 metric ton of crude palm oil ('CPO') from Kantor Permasaran Bersama ('KPB') on Free On Board ('FOB') terms in Belawan, Indonesia for USD1,874,317.25. The plaintiff then entered into an agreement to sell the CPO to Summerwind Trading Pte Ltd ('Summerwind') for USD1,917,965.75. The CPO under the agreement was to be delivered to Chittagong, Bangladesh. Summerwind did not make any payment for the CPO. The cargo of CPO was loaded on board the vessel called 'Suppavan 1' at Belawan, Indonesia, and was discharged at Port Klang, Malaysia instead of Chittagong, Bangladesh. The vessel owner on 9 November 2003 had discharged and delivered the CPO into the defendant's shore tanks at Port Klang.

[4] It turned out that pursuant to sale contracts, Mewaholeo Industries Sdn Bhd ('Mewahholeo'), a sister company of the defendant, had purchased the CPO from Summerwind and the defendant then in turn purchased it from Mewahholeo. The plaintiff alleged that in receiving the plaintiff's CPO cargo from the vessel 'Suppavan 1' at Port Klang, the defendant failed to ensure that it was receiving the CPO cargo from the owner or person having possessory rights to the cargo. The plaintiff alleged that the defendant had thus converted

the plaintiff's CPO cargo. The present civil suit was then filed with the plaintiff claiming for the sum of US$1,917,965.75 as damages for conversion, interest at 8%pa from date of conversion and costs.

[5] The plaintiff had also commenced a civil suit against Summerwind and its two directors in the High Court at Singapore claiming for the full amount of the CPO which was loaded on board three different vessels including the relevant vessel (Suppavan 1) in the instant case. A final judgment in default of appearance was entered against Summerwind and its directors in 2006 and 2008 respectively.

AT THE HIGH COURT

[6] At the High Court in Shah Alam, the defendant raised several defences, in particular:

(a) that the plaintiff failed on a balance of probabilities to prove that they had actually made payment to KPB and acquired good title of the CPO;

(b) that the plaintiff has no 'locus standi' to maintain this claim against the defendant for conversion as they had no legal right to immediate possession of the CPO under the local bills of lading issued by the vessel owner to KPB;

(c) that the defendant in good faith and without prior notice or knowledge of any purported rights of the plaintiff, purchased the CPO from Mewaholeo pursuant to sale contracts and made full payment to Mewaholeo. Mewaholeo in turn purchased the CPO from Summerwind pursuant to sale contracts and made full payment towards to Summerwind. Therefore, at all material time, the defendant obtained good title to the CPO; and

(d) that by virtue of the plaintiff taking legal action against Summerwind in the High Court in Singapore for the price of the CPO and not for the CPO itself or title to the same, it has rendered the entire action before this honourable court as misconceived. The judgment obtained by the plaintiff in the High Court in Singapore effectively renders this entire action by the plaintiff against the defendant unsustainable.

[7] After a trial, the learned High Court judge came to the conclusion that the plaintiff had proved their case. The learned judge found that based on the evidence, payment in full had been made by the plaintiff to KPB. It was also found that the retention of the original bills of lading was the clearest proof of title to the CPO that was discharged into the defendant's shore tanks at Port Klang. The plaintiff in the circumstances had proved on a balance of

probabilities that it had the legal title and right to the immediate possession of the CPO on the date the same was loaded onto the vessel Suppavan 1.

[8] It was also held that the defendant's acts of physically receiving the CPO from the vessel Suppavan 1 and discharging the same into its shore tanks and thereafter processing and refining the CPO without the consent and knowledge of the plaintiff, constituted conversion of the plaintiff's CPO. It was further held that the judgment in the Singapore High Court was not a bar to the plaintiff bringing the present action against the defendant bearing in mind that the law recognises separate claims against multiple tortfeasors in conversion (see judgment of High Court as reported — *Lushing Traders Pte Ltd v Mewah-Oils Sdn Bhd* [2016] 6 AMR 616).

THE INSTANT APPEAL

[9] Before us, much of the same arguments were canvassed to establish that the learned judge was in error in coming to her findings. The issues raised in the appeal were firstly, whether the plaintiff was the owner of the cargo of 4,999.850 metric tons of crude palm oil in bulk carried on board the vessel Suppavan 1 under the bills of landing Nos BLW/CTB-01, BLW/CTB-02, BLW/CTB-03, BLW/CTB-04 and BLW/CTB-05, all dated 8 November 2003. The second issue raised was connected to the first; whether the plaintiff had the right to immediate possession of the cargo carried on board the vessel Suppavan 1 and/or held under the original bills of lading.

[10] The third issue was whether the defendant had wrongfully received, handled, stored and dealt with the CPO cargo and thereby converted the same when they received the same from the vessel Suppavan 1 at Port Klang into its shore tanks. The final issue was whether the plaintiff is estopped from bringing legal action against the defendant as the plaintiff has obtained judgment against Summerwind for the purchase price of the same CPO in the Singapore High Court.

First and second issues — Whether the plaintiff is the owner of the CPO and had the right to immediate possession?

[11] The first two issues, as rightly observed by the learned judge, are inter-connected. It was contended on behalf of the defendant that the plaintiff had not provided any evidence that it had made payment to KPB. Consequently, the plaintiff cannot claim to have ownership or right to possession of the CPO. Much was made of the fact that KPB persisted to issue an invoice for payment dated 10 November 2003 and bills of exchange dated 10 November 2003 demanding for full payment of the CPO from the plaintiff. This showed that the plaintiff had not made full payment as alleged. The

plaintiff had therefore no title and was not the owner of the CPO when the same was delivered to the defendant. In the circumstances, it was submitted that the plaintiff had no locus standi to bring this action against the defendant for conversion.

[12] It was also submitted that the plaintiff had no right to immediate possession of the CPO as at the time the CPO was discharged into the defendant's shore tanks, the plaintiff did not have the original bills of lading in their possession. On this ground, it was asserted that the High Court order should be set aside.

[13] In this regard, we are in agreement with the learned judge that as the claim was based on the tort of conversion, the burden was on the plaintiff to prove that at the material time the property in the CPO cargo had passed from KPB to the plaintiff such that it was the owner. To prove this, the burden fell on the plaintiff to establish that payment had been made by them to KPB.

[14] The law in this regard is without controversy and well established. Both parties, as well as the learned judge, referred to the House of Lords decision in *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd; The Aliakmon* [1986] 2 All ER 145 where it was held that a person who is not the owner of goods at the time that the damage occurred cannot sue in tort. This is how Lord Brandon in the leading judgment characterised the legal position at p 149:

> ... in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.

[15] In this connection, the learned judge accepted the evidence of PW2, who was a director of the plaintiff and who testified on the shipping procedure. His pertinent evidence was summarised by the learned judge in the judgment as follows:

> 38.1 The shipment of the CPO cargo onto the Suppavan 1 was done on 8 November 2003. The BL at pp 22–26 in the common bundle of documents ('CBD') are all dated 8 November 2003. The date 8 November 2003 is the shipment date, ie the date when the CPO cargo was loaded onto Suppavan 1. The original BL was received in the Jakarta office from KPB on 10 November 2003;
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> 38.2 BL is issued once the goods are on board the vessel. The surveyors report is integral for the purpose of the creation of the BL. The surveyors report is in CBD p 41 dated 10 November 2003. Before the surveyors report is issued, they have a preliminary report which is signed by all parties: the captain representing the ship owner, the

surveyor representing Lushing, the buyer or any other parties. Once all the parties agreed to the final figure, they will sign on the preliminary report and the actual report which is the surveyor's report will be done or issued later. The surveyor's report will have the same figures as the preliminary report. The final figures in the preliminary report will be written in the BL. The surveyor's report will have the same figures as the preliminary report;

38.3 The BL clearly identified that our cargo was appropriated and ascertained in the ship's cargo tanks 1P, 1S, 2P, 2S, 3P, 3S, 4P, 4S, 5P and 5S. The surveyors, SUCOFINDO, had also confirmed in their reports (CBD pp 19–23) that the CPO cargo totalling 4,999.850 metric tons was loaded from the shore tanks at the load port into the vessel 'Suppavan 1' at Belawan on 8 November 2003. Thus 'Suppavan 1 loaded and carried the plaintiff's cargo and no other. The defendant's surveyors, SGS (Malaysia) Sdn Bhd ('SGS') had also surveyed the cargo tanks on board Suppavan 1 before and after discharge at Port Klang and recorded that all the plaintiff's CPO cargo had been discharged into the defendant's shore tanks;

38.4 Lushing bought the CPO cargo from KPB for onward sales and not for Lushing's own use. Payment is by irrevocable unrestricted letter of credit ('LC') payable by Summerwind. It is common for parties to buy and sell the same cargo a few times in the shipping business. In this case, Lushing had entered into a sale agreement to sell the CPO to Summerwind. The particulars stated in the BL at p 22 CBD states the consignee as Prime Bank Ltd in Agrabad Branch, Chittagong, Bangladesh; notify address at Bay Fishing Co Ltd; the master of the ship is PT Admiral Line, Thai OGA Trading Ltd as owner of the vessel Suppavan 1, Summerwind as charterer of the vessel Suppavan 1 were all inserted at the request of Summerwind who was the buyer and charterer through their LC. It does not matter that Lushing is not named in the BL since Lushing as the holder of the BL is the owner of the CPO cargo and a receiver of the cargo must produce the BL to receive the Cargo;

38.5 Lushing paid KPB and proof of payment can be seen in CBD pp 43–44 dated 10 November 2003 which are bills of exchanges cash receipts to the amount of US 1,874,317.25 These documents were prepared by KPB's bank which is Mandiri Bank. Lushing had instructed Kalpataru to make the payment on their behalf. The payment for the CPO was made in advance through their bank as per the invoice at CBD p 42 dated 10 November 2003. Though Lushing paid in advance, it is not reflected or stated in the invoice. The invoice can be given later but KPB will never load the cargo before payment is made.

38.6 In the sale of cargo shipped by sea the original BL is a very important document as it is a document which represents the cargo sold. The original BL also gives the right of possession as it allows the holder to collect the cargo at destination. As part of the sale process, the passing

of the original BL to the buyer is necessary once payment is made. In this case the plaintiff had never transferred the original BL to Summerwind since Summerwind has never made any payment for the Cargo. Thus Summerwind has no ownership or possessory rights in the CPO cargo.

[16] On the question of when payment was made by the plaintiff, the learned judge referred to the evidence of PW1, who was the Head of Palm Oil Marketing of KPB, and PW3, who was the chairman and managing director of the plaintiff. PW1 testified that payment in full had been received by KPB from the plaintiff before the cargo was loaded on board the Suppavan 1 at Belawan port on 8 November 2003. PW1 also told the court that it was KPB's policy to load a cargo onto a ship only after payment had been received.

[17] The learned judge also appeared to place particular significance on the evidence of PW3 as summarised in the judgment as follows:

42.1 PW3 made advance payment on the CPO cargo of US732,500 on 10 October 2003 and US 770,000 on 30 October 2003, totalling US 1,502,500. PW3 clarified that the differences in contract quantities and actual loaded quantities were due to the nature of cargo of CPO being liquid in bulk. Due to its liquid form, it was extremely difficult to achieve an exact round figure. Thus advance payment were made for certain quantities in round figures;

42.2 The documents at CBD pp 43–44 in the sum of US1,874,317.25 are receipts or acknowledgements of payment by KPB (seller) of the CPO cargo sold to Lushing (buyer). Thus before 8 November 2003 Lushing had already paid for all the CPO cargo;

42.2 Thus Lushing became the owner of the CPO cargo on board the Suppavan 1 when it was loaded on 8 November 2003 since they have paid for the CPO cargo. Lushing received the original BL from KPB on 10 November 2003 at their Medan office;

42.3 Lushing entered into a contract of sale with Summerwind on the same CPO cargo for USD1,917,965.75. Terms of payment was by LC. Lushing failed to make payment for the CPO cargo and Lushing did not give the original BL to Summerwind;

42.4 Lushing is and was at all times the owner of the CPO cargo and the lawful holder of the BL and is the party entitled to immediate possession of the CPO cargo.

[18] Now although payment for CPO cargo had been made by 8 November 2003, the original bills of lading ('BL') came into the possession of the plaintiff on 10 November 2003. So although the discharge of the CPO into the defendant's shore tanks commenced on 9 November 2003, it was completed on 10 November 2003. Even then the CPO would have been in the possession

of the defendant for much longer after that as the defendant then proceeded with processing and refining the CPO into refined deodorised palm olein. This would certainly be well after the plaintiff had possession of the BLs.

[19] It is trite law that a bill of lading operates in commercial transactions as a document of title to goods. Section 2 of the Sales of Goods Act 1957 provides that a document of title to goods includes a bill of lading. In a leading case on the subject, the English Court of Appeal decision in *Enichem Anic SpA v Ampelos Shipping Co Ltd, The Delfini* [1990] 1 Lloyd's Law Rep 252, Lord Justice Mustill depicted the function of a bill of lading as 'the key to the warehouse' where His Lordship stated at p 268:

> First, as to the status of the bill of lading as a 'document of title'. I put this expression in quotation marks, because although it is often used in relation to a bill of lading, it does not in this context bear its ordinary meaning. It signifies that in addition to its other characteristics as a receipt for the goods and as evidence of the contract of carriage between shipper and shipowner, the bill of lading fulfils two distinct functions. 1. It is a symbol of constructive possession of the goods which (unlike many such symbols) can transfer constructive possession by endorsement and transfer; it is a transferable 'key to the warehouse'. 2. It is a document which, although not itself capable of directly transferring the property in the goods which it represents, merely by endorsement and delivery, nevertheless is capable of being part of the mechanism by which property is passed.

[20] In the circumstances, the learned judge was right to conclude that the plaintiff's possession and continued retention of the original BLs was the 'clearest possible proof of the plaintiff's retention of title to the CPO cargo that was discharged at Port Klang into the defendant's shore tanks'. It must follow that the property in the cargo had passed from KPB to the plaintiff if not at the date of the BL (8 November 2003) then at the latest on 10 November 2003.

[21] In any event, it is highly improbable that KPB would have released the CPO cargo to the plaintiff without being paid first. In the English Court of Appeal case of *Mitsui & Co Ltd and another v Flota Mercante Grancolombiana SA; The Ciudad de Pasto, The Ciudad de Neiva* [1989] 1 All ER 951; [1988] 1 WLR 1145, a case where goods were damaged on board a ship and ownership of the goods became the principal issue, Staughton LJ had occasion to observe at p 1153:

> It seems to me that in the ordinary way a seller will not wish to part with the property in his goods if they are shipped overseas until he has been paid in full. There is support for that view again in *Benjamin's Sale of Goods*, p 938, towards the end of para 1484:
>
> > In overseas sales, there is, therefore, a fairly strong presumption that the seller does not intend to part with property until he has either been paid or been given an adequate assurance of payment. Of course the presumption may be rebutted:

> for example, by the fact that buyer and seller are associated companies (so that the seller does not need security for payment) or by the fact that the contract expressly provides for credit.

[22] Apart from the oral evidence and the documentary evidence revealed at the trial, there is certainly a strong presumption, which has not been displaced, that when the CPO was loaded onto the vessel Suppavan 1, the seller KPB had been paid for the said cargo by the plaintiff. Considering all the circumstances, we agree that the learned judge was entitled to come to a finding that the plaintiff had, on a balance of probabilities, proved that it had legal title and right to the immediate possession to the CPO cargo on 8 November 2003. As such, the plaintiff could maintain its suit against the defendants for conversion.

Third issue — Whether the defendant had wrongfully received and converted the CPO?

[23] In this connection, the defendant contended that they had acted in good faith and without prior notice or knowledge of any purported rights of the plaintiff, purchased the CPO from Mewaholeo pursuant to sale contracts and made full payment to Mewaholeo. Mewaholeo in turn purchased the CPO from Summerwind pursuant to sale contracts and made full payment to Summerwind. It was accordingly submitted that the defendant obtained good title to the CPO and had not wrongfully received and converted the same.

[24] With respect, this submission appears to have overlooked settled principles of law regarding the tort of conversion. The authors of *Clerk & Lindsell on Torts* (20th Ed), at paras 17–09 characterised conversion in the following fashion:

> Anyone who without authority receives or takes possession of another's goods with the intention of asserting some right or dominion over them, or deals with them in a manner inconsistent with the right of the true owner is prima facie guilty of conversion; provided there is an intention on the part of the person dealing with them to negative the right of the true owner or to assert a right inconsistent therewith. A thief, therefore, commits conversion, as does a person purporting to exercise a lien he does not have, not to mention a person who buys goods which turn out not to have belonged to the seller and a seller of goods who, having despatched them, wrongfully retakes them from the carrier (even temporarily).

[25] It is axiomatic that acting innocently, in good faith, in ignorance or by mistake is generally irrelevant in a claim for conversion. A defendant's liability in conversion will be established irrespective of whether or not he knew or had reason to know that he was asserting rights belonging to the plaintiff. In the oft-quoted case of *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956, Diplock LJ expressed the position as follows (at pp 970–971):

> At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known of his neighbour's interest in the goods. This duty is absolute; he acts at his peril.

[26] So unless a defendant can invoke some recognised exceptions, which is not the case here, he will be liable even if his actions were reasonable or well-intentioned. This strict approach to liability is well established in Malaysian law as decided by the Federal Court in *Rimba Muda Timber Trading v Lim Kuoh Wee* [2006] 4 MLJ 505 and followed in *United Plastics Sdn Bhd v Chan Teng Song & Anor* [2009] MLJU 1556; [2010] 8 CLJ 120 and *Syarikat Bekalan Air Selangor Sdn Bhd v Liew Lai Yin* [2010] 3 MLJ 76.

[27] Reverting to the instant case, the learned judge found that the defendant had physically received the cargo from the vessel Suppavan 1 at Port Klang on 9 November 2003. Discharge of the CPO cargo commenced on the same day and was completed on 10 November 2003. Subsequently the defendant processed and refined the CPO into refined deodorised bleached ('RDB') palm olein. These acts were without the knowledge and consent of the plaintiff as the owner of the CPO cargo. The learned judge was therefore entitled to come to a finding that this constituted conversion of the plaintiff's goods.

[28] It is, with respect, futile for the defendant to argue that it had acted under the misapprehension that the cargo belonged to Summerwind. This claim of acting innocently in receiving the cargo, although irrelevant as alluded to earlier, is not quite the case as the defendant had appeared to accept a grossly defective bill of lading for the shipment. Seen as such, the plaintiff's depiction of the defendant acting in a blind and reckless manner in its dealing with Summerwind, is not without merit.

[29] It may be useful to remind ourselves that the law jealously guards the rights of the true owner. In the Federal Court case of *Rimba Muda*, Arifin Zakaria FCJ (now CJ) approved of the legal position explained by Lord Denning MR in *RH Willis and Son (a firm) v British Car Auctions Ltd* [1978] 1 WLR 438 as follows:

> ... the common law has always acted on the maxim *nemo dat quod non habet*. It has protected the property rights of the true owner. It has enforced them strictly as against anyone who deals with goods inconsistently with the dominion of the true owner. Even though the true owner may have been very negligent and the defendant may have acted in complete innocence, nevertheless the common law held him liable in conversion.

Fourth issue — Whether the plaintiff is estopped from bringing legal action against the defendant as the plaintiff has obtained judgment against Summerwind for the purchase price of the same CPO in the Singapore High Court?

[30] In this regard, the defendant referred to a civil suit filed by the plaintiff in the Johor Bahru High Court against Felda-Johore (*Mewah Oils Sdn Bhd v Felda-Johore* Civil Suit No MT4-11–728 of 2009 (unreported)) ('JB case') to recover the purchase price of CPO on board the vessel Orapin 3 which formed part of the plaintiff's claim in their civil action against Summerwind and its two directors in the Singapore High Court.

[31] In that *JB* case, the learned High Court judge came to the following finding in the grounds of judgment dated 13 January 2014:

> [38] The plaintiff alleged that Summerwind did not make any payment for the CPO cargo and that the plaintiffs' did not transfer any rights or interest in the cargo to Summerwind. The plaintiff's argument did not correspond with the facts and evidence before this court. The fact is that the plaintiff did release the subject matter cargo to Summerwind. The plaintiff had successfully obtained judgment against Summerwind in the Singapore High Court and that the plaintiff admitted that Summerwind is the party solely responsible and liable to the plaintiff for the CPO cargo. The plaintiff had invoiced Summerwind for the same cargo totalling USD1,532,236.18, the same amount they are claiming against the defendant in this action. By their action, the plaintiff admitted that Summerwind has possession and ownership rights in the subject matter cargo, and that the plaintiff has lost its rights to possession and ownership in the said CPO cargo.

[32] The learned judge in the *JB* case relied on the decision of this court in *Air Conditioning Systems Design Sdn Bhd v Chuah Teong Hooi & Anor (as receiver and managers of the property of Atlas Intek (M) Sdn Bhd)* [1998] 4 MLJ 633 ('*ACS Design*') where the court referred to with approval the High Court judgment which read as follows at pp 638–639:

> But what was even more relevant to my mind was the fact that the plaintiff had obtained a final judgment against Avtech on 28 October 1985 (before instituting this action and the related suit) for the price of the same goods in question in Suit 22–1282–1985 in the High Court of Malaya at Penang wherein the plaintiff had not claimed for the possession or return of the goods, which was an admission that the property in the goods had in fact passed to Avtech and subsequently to the defendants.
>
> In the circumstances, I found myself in agreement with counsel for the defendants who submitted that 'the plaintiff would have been aware that having obtained judgment for the price of the goods, all the rights of the plaintiff would have merged in the judgment and it would in fact be too late to pursue a claim for the return of the goods from Avtech, let alone the defendants.

And later on in the same judgment at p 639:

> At the time the plaintiff filed the claim against Avtech and obtained a final judgment for the price of the goods which very goods are the subject-matter of this action and the related suit, it elected not to seek the return of the goods, thereby conceding that the title in them had passed to Avtech. ... It therefore follows that neither could the plaintiff raise that cause of action against the defendants in this action and the related suit as all the plaintiff's rights in respect of the goods would have merged in the judgment and the plea of res judicata would be available to the defendants.

[33] It was accordingly submitted that as the final judgment in the Singapore High Court subsists, where a clear election has been made by the plaintiff to sue Summerwind only for the price of the CPO, the plaintiff, by its own action, has caused all of its rights to merge into the said judgment. The plaintiff has thus lost all its rights to possession and ownership in the CPO and by successfully obtaining judgment against Summerwind, the plaintiff's claim based on conversion in the present appeal should fail.

[34] In this context, we note that in the Singapore case, the plaintiff had pursued a claim against Summerwind and its two directors for non-payment of three separate shipments which comprised of the shipments on the vessels Orapin 3, Suppavan 1 and Istana IV. The defendants there did not enter appearance and the plaintiff took judgment in default. The claim included the price/value of the goods for non-payment under the sales contract as well as for conversion of the said goods.

[35] Now the plaintiff in the Singapore action had expressly reserved and preserved its rights to the cargo and rights to possession which possessory rights are a pre-requisite to a claim in conversion. The plaintiff had stated that at all material times they were the owners and the holders of the bills of lading. There was no concession or admission that any title or possessory rights had been relinquished. The facts were therefore quite different from that in the *ACS Design* case.

[36] The fact that there were now two actions for conversion of the same goods against different entities is not fatal as the law recognises separate claims against multiple tortfeasors in conversion. In *Clerk & Lindsell on Torts* (20th Ed), at para 17–125 it is stated:

> The owner of a chattel who has been deprived of his possession may well have a remedy against more than one person. For example, A may have wrongfully taken it and B may afterwards have bought it, sold it or wrongfully detained it. A and B are here not joint tortfeasors; there is a perfectly independent right of action against each other.

[37] In the instant case, the tort of conversion would have been committed by Summerwind when they sought to deprive the plaintiff of the cargo without

making any payment. The defendant would also be liable as they had bought, received, processed and refined the cargo and failed to return it to the plaintiff. These are successive acts and liability will attach independently for their separate roles.

[38] More importantly, no payment had been made by Summerwind. As the learned judge noted, Summerwind has been wound up. We agree with the learned judge that the unrealised judgment of a monetary debt could not erase the defendant's tort of conversion. In any case, it is clear that the possessory rights had never passed to Summerwind as the original bills of lading always remained with the plaintiff and never passed to Summerwind. This was simply because no payment had been made for the goods. The defendant knew the significance of the bill of lading as a feeble attempt was made to introduce a draft bill of lading into evidence. So unlike the *ACS Design* case, the instant case was one where possessory rights and title does not pass until full payment is made (see *Shanti Kant Jingham v Owners or other persons interested in the vessel 'Indera Pertama'* [1989] 3 MLJ 58). In the circumstances, the principles of merger and *res judicata* do not apply and the Singapore judgment did not bar the plaintiff's claim against the defendant.

[39] The learned judge has to a great extent set out her understanding of the effect of the Singapore judgment to the present suit. We have no quarrel with the reasons provided and fully endorse her findings

CONCLUSION

[40] In the circumstances, and for the reasons we have given, we were of the view that the appeal was without merit. The appeal was therefore dismissed with costs. The order of the High Court was affirmed. After hearing the parties, we fixed costs at RM20,000 subject to payment of allocator fees. We also ordered the deposit to be refunded to the appellant/defendant.

Appeal dismissed and decision of the High Court affirmed.

Reported by Ashok Kumar